Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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In the Matter of	)	
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Personal Communications Industry	)	
Association's Broadband Personal	)	
Communications Services Alliance's	)	
Petition for Forbearance For Broadband	)	
Personal Communications Services	)	
	)	
Biennial Regulatory Review - Elimination	)	
or Streamlining of Unnecessary and	)	
Obsolete CMRS Regulations	)	
	)	
Forbearance from Applying Provisions	)	
of the Communications Act to Wireless	)	WT Docket No. 98-100
Telecommunications Carriers	)	

COMMENTS OF COMCAST CELLULAR COMMUNICATIONS, INC.

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SUMMARY

Competition has always been the hallmark of the CMRS industry. From the early duopoly cellular days to today's marketplace with up to six different facilities-based providers in one geographic area, competition has always governed and shaped the CMRS environment. Indeed, competition and a relative lack of regulation has given the CMRS industry its own distinct characteristics, characteristics that are strikingly different from those of the monopoly or near monopoly landline incumbent LEC industry.

In the past the Commission recognized that the competitive CMRS industry need not be, and should not be, regulated in the same manner as the incumbent monopoly LECs. This was consistent with Congress' policy decision that CMRS competition should be encouraged on the national level by a regulatory agency that understood the promise of potential CMRS-landline competition. The Commission's recent rulemakings implementing the 1996 Act, however, have largely forgotten that CMRS is a very different, distinct segment of the telecommunications industry. Rather than recognizing that CMRS, as a competitive industry, is largely controlled by market forces, the Commission has chosen to regulate all telecommunications carriers in the same manner and using the same mechanisms under a policy of regulatory symmetry. Uniform regulations, largely tailored to the needs and practices of incumbent LECs, are manifestly ill-suited for CMRS as has been obvious from the practical problems that have emerged as CMRS struggles to comply with landline-oriented regulations.

The Commission is now asking whether there are rules that pose either "undue costs" or "yield no benefits to the public" as to CMRS providers. Comcast respectfully asserts that this is the wrong time to be asking these sorts of questions. The Commission should never be imposing rules that "yield no benefits to the public" or that will cause "undue costs" on CMRS carriers.

Instead, it is the Commission's responsibility to regulate in a manner that promotes the public interest from the beginning.

Currently, the Commission's regulations concerning CPNI, Universal Service, interexchange rate averaging and number portability are particularly troublesome for CMRS carriers as they fail to account for the relevant differences of the CMRS industry. The Commission should reexamine its rules in these areas, either as part of this proceeding or as part of the reconsideration in the original dockets. Then, going forward, the Commission must not repeat the mistakes of the recent past by continuing to regulate under a policy of regulatory symmetry regardless of whether symmetry makes sense. Instead, the Commission should take a detailed and market specific approach to regulation, one that assesses the fundamental differences in carrier markets before imposing regulation. Regulations should be tailored for different services where different markets dictate different approaches. There is no substitute for this analysis.

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COMMENTS OF
COMCAST CELLULAR COMMUNICATIONS, INC.

Comcast Cellular Communications, Inc. ("Comcast") hereby responds to the Commission's request for comment on whether and how forbearance from applying the Commission's rules may be appropriate for commercial mobile services ("CMRS") providers.[1/] This proceeding arises as part of the Commission's consideration of the Personal Communications Industry Association's ("PCIA") Petition for Forbearance and as a result of the Commission's biennial examination of its regulations.

1/ *In the Matter of Personal Communications Industry Association's Broadband Personal Communications Services Alliance's Petition for Forbearance For Broadband Personal Communications Services, Biennial Regulatory Review - Elimination or Streamlining of Unnecessary and Obsolete CMRS Regulations, Forbearance from Applying Provisions of the Communications Act to Wireless Telecommunications Carriers,* Memorandum Opinion and Order and Notice of Proposed Rulemaking, WT Docket No. 98-100, FCC 98-134 (released July 2, 1998) (*"Notice"*).

I. TAILORED RULES FOR DIFFERENT INDUSTRY GROUPS IS SOUND PUBLIC POLICY.

Comcast is a provider of cellular service in major portions of Pennsylvania, New Jersey and Delaware. Comcast is one of six facilities-based CMRS service providers in the Philadelphia area. Additionally, Comcast affiliates hold personal communications service ("PCS") and wireless communications service ("WCS") licenses. As a long-term wireless provider, Comcast participated extensively in the Commission's forbearance and CMRS regulatory parity efforts resulting from the statutory changes in the Omnibus Budget Reconciliation Act of 1993 (the "1993 Budget Act"). Comcast also participated extensively in the proceedings that implemented the interconnection and Universal Service provisions of the Telecommunications Act of 1996 (the "1996 Act"). Comcast is filing these comments to provide its perspective on how the Commission might approach balancing its stated goals of regulatory symmetry and regulatory forbearance.

The *Notice* asks for comment on whether for certain types of wireless providers the application of a particular statutory or regulatory provisions will pose either "undue costs" or "yield no benefits to the public."[2/] The *Notice* also solicits comment on whether forbearance from the application of particular rules on particular types of wireless providers would comport with the Commission's goal of regulatory symmetry.[3/] While Comcast agrees that these are important issues that must be addressed, Comcast respectfully asserts that the Commission is placing the cart before the horse.

It is clearly positive for the Commission to review its CMRS rules periodically to determine if there are regulatory burdens that can be lightened or eliminated. However, the

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2/ *Id.* at ¶ 116.

3/ *Id.* at ¶ 117.

Notice evidences an incorrect assumption that pervades much of the new regulation occasioned by the 1996 Act: that "regulatory symmetry" is a basic legal requirement or an end in itself. Legal obligations clearly attach to every telecommunications carrier under the 1996 Act. But nowhere in the Act has Congress mandated "regulatory symmetry" across all segments of the telecommunications industry. Moreover, in implementing the 1996 Act's provisions that relate generally to telecommunications carriers, the Commission has not fully considered the striking differences among carriers and competitive segments. Instead, it has, by and large, chosen to regulate all classes of carriers uniformly based on a stated preference for regulatory symmetry. Comcast questions this approach, and suggests that efforts to apply identical rules to all industry sectors will be a barrier to the evolution of competitive telecommunications industries such as the CMRS industry.

CMRS has been a tremendous policy success story both for the Commission and the public. In broadband CMRS, for example, at least two facilities-based providers have competed with each other for mobile customers. Now in much of the country, there are four, five, or six providers competing with one another. The intense wireless competition consistently provides mobile customers with new and innovative services and service packages and increasingly attractive pricing plans. While wireless services may someday evolve into more direct local loop competition, CMRS networks are primarily built as mobile service networks, and the competition that exists today is predominantly among CMRS operators for CMRS customers.[4/]

CMRS providers are still only potential competitors to the incumbent local exchange carriers, and potential competitors should not be regulated as actual competitors. To regulate

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4/ It is of note that Congress specifically provided that cellular mobile radiotelephone service "shall not be considered to be telephone exchange services" when determining whether a Bell operating company faces facilities-based competition for purposes of Section 271 interLATA relief applications. 47 U.S.C. §271(c)(1)(A).

CMRS as if it were today a full-fledged local loop competitor is manifestly harmful to the CMRS industry and its ability to grow and expand into new service areas. Too often the Commission adopts rules, without any factual analysis, and which assume that CMRS must be regulated in an identical fashion as other carriers. The time to evaluate the propriety of any new regulatory burdens on the most competitive facilities-based segment of the telecommunications industry is when the rules are adopted, not in special proceedings after the fact. The Commission should take a detailed and market specific approach to regulation, one that assesses the fundamental differences in carrier markets *before* imposing regulation. Regulations should be tailored for different services where different markets dictate different approaches. There is no effective substitute for conducting industry-specific analysis before imposing uniform rules across market segments.

II. DISTINCT CHARACTERISTICS OF THE CMRS INDUSTRY REQUIRE CMRS-SPECIFIC REGULATION.

The *Notice* requests comment on whether forbearance of the application of certain rules to CMRS providers would comport with the goal of "regulatory symmetry." The Commission more appropriately should ask why uniform rules should apply given the fundamental differences, for example, between the CMRS and incumbent local exchange carrier ("ILEC") markets.

A. CMRS Providers Have Their Own Distinct Characteristics.

Broadband CMRS providers are fundamentally different from landline LECs. They are licensed directly by the Commission rather than certified by state commissions. They increasingly operate on a multistate or even nationwide basis. In contrast, ILEC and even CLEC operations are typically authorized and regulated by the state public utility commissions that

have primary authority to oversee ILEC and CLEC activities, and operate within the confines of regions bounded by those states.

CMRS carriers are licensed for territories which span state borders and their networks have developed accordingly. Comcast, for example, maintains switches that serve as many as four states, and there are cell sites in Comcast's network which can serve as many as three states. While LECs serve only those customers within geographically limited territories, CMRS providers' signals cannot be stopped at a geopolitical border. CMRS networks are designed differently from ILEC networks to accommodate mobile traffic. The availability of CMRS services are completely dependent upon technology-specific handsets which are interchangeable within a particular carrier's system, and are further dependent upon integration with adjacent carriers as well as other carriers throughout the nation (including the availability of overlaps, hand-off capabilities, signaling systems and which relay caller characteristics and peculiar routing instructions, etc.). By the very nature of CMRS services, customers desire to roam and to receive mobile services at predictable rates wherever they may travel. The same cannot be said for the local exchange.

The characteristics of the markets ILECs and CMRS providers serve also could not be more dissimilar. The landline local exchange market is a monopoly. The many recent merger announcements have had, and will continue to have, no effect on that. The recently announced merger between Bell Atlantic and GTE will not add a single new local competitor to either ILEC's territory. CMRS, in contrast, is a competitive marketplace. Even under the former duopoly structure, competition was vibrant and evident in service rates, increasing local service area sizes, innovative products and services, and phone prices. No one can credibly make a similar claim with respect to the landline local exchange market. CMRS could not have grown as quickly if that were not the case. With the advent of PCS and ESMR and competition from

facilities-based carriers (*i.e.*, companies investing billions of dollars to develop their own networks), prices have dropped even more, a greater variety of services have been made available, and more people are gravitating to these services.

The effect of competition has been to increase subscribership. But even while the CMRS penetration rate has been increasing, CMRS only serves approximately 20 percent of the population in the most highly penetrated markets, and that penetration rate is one that is shared among up to six CMRS competitors. Even with increasing adoption, these services are still perceived as mobile services. Unsupported claims to the contrary, wireless services are still perceived as ancillary, not indispensable, and are certainly not viewed as an outright substitute for landline service. Local exchange service, by contrast, is perceived as a necessity, so much so that it is considered a priority to maintain ILEC penetration rates at ubiquitous levels.[5/]

Further, CMRS providers have always faced competition. ILECs, in contrast, have enjoyed legally sanctioned monopolies for many years, with some local markets finally opening to competition only upon the gradual implementation of the 1996 Act.[6/] While states can no longer forbid competitive local exchange carriers from entering markets, no one doubts that this

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5/ *See Federal-State Joint Board on Universal Service*, Report and Order, CC Docket No. 96-45 (released May 8, 1997) at ¶ 8 ("Universal service support mechanisms that are designed to increase subscribership . . . will benefit everyone in the country . . . increasing the number of people connected to the telecommunications network makes the network more valuable . . . [i]ncreasing subscribership also benefits society. . . .").

6/ Comcast notes that numerous ILEC lawsuits have slowed the 1996 Act's promise of competition. *See, e.g., Texas Office of Public Utility Counsel, et al. v. Federal Communications Commission and the United States of America,* in the United States Court of Appeals for the Fifth Circuit, No. 97-60421 and Consolidated Cases; *AT&T Corp., et al., v. Iowa Utilities Board, et al.*, in the Supreme Court of the United States, Nos. 97-826, 97-829, 97-830, 97-831, 97-1075, 97-1087, 97-1099, 97-1141.

process is slow and that, in the meantime, ILECs will continue to enjoy monopoly or near-monopoly status.[7/]

These dynamic differences between the intensely competitive, interstate CMRS market and the near-monopoly, local exchange market create a host of additional business considerations for CMRS providers that ILECs do not face. CMRS providers have to be much more concerned about competitive pricing, developing new and better service packages, and curtailing customer churn because there *are* alternatives. Moreover, the dynamics of acquiring and retaining customers who do not view your services as a necessity, in a competitive marketplace, where annual churn can be the equivalent of a quarter of your base, are very different from the landline paradigm from which the Commission tends to regulate.

CMRS carriers also are still constantly investing in their highly capital intensive networks, and without the benefit of the implicit (now implicit/explicit subsidies) which have defined the regulatory treatment of ILECs. ILECs also enjoy a protected, virtually guaranteed income stream from captive ratepayer customers who lack an effective alternative carrier choice. Where that is lacking ILECs are afforded guaranteed rates of return. CMRS providers operate in a vastly less certain business environment. As a consequence, regulatory burdens framed to accommodate a LEC environment can have severe competitive impacts on CMRS providers and their customers.

7/ ILECs still hold an approximate 98% market share. *See* 1998 Annual Report on Local Telecommunications Competition, New Paradigm Resources Group, 9th Ed., Table II (based on comparison of telecommunications revenues). *See also* testimony of Steven G. Chrust, Vice Chairman of WinStar Communications, Inc., FCC En Banc Hearing, July 9, 1998 ("The time frame under which [competition] is likely to occur under any realistic set of assumptions needs to be effectively understood and evaluated. This is not going to happen in 24 months. It's going to happen over a decade or two.").

In the past the Commission has recognized these differences and, consequently, found no reason to regulate CMRS in the same manner as ILECs. For example, consistent with the interstate nature of the CMRS industry, the Commission determined that it advanced the public interest to license CMRS providers over wide interstate areas.[8/] Moreover, Congress expressly recognized that CMRS carriers and their industry were different and were to be governed under a different regulatory scheme. This scheme has encouraged the growth and further development of CMRS by, among other things, specifically limiting state regulatory authority over CMRS providers.[9/] Further, Congress authorized the creation of the Wireless Telecommunications Bureau to oversee the licensing and regulation of wireless providers separately from the operations and regulations of the Common Carrier Bureau.

Notwithstanding all of the foregoing, the Commission of late has apparently adopted, on its own, a supposed "regulatory symmetry" model which begins and ends proceedings by assuming that all telecommunications carriers are the same, and thus must be regulated the same. This places an extremely high burden on CMRS carriers to prove the opposite. This approach is an abdication of the Commission's responsibility to develop rules and policies which will encourage investment in competitive marketplaces. Even if well intentioned,[10/] it is an approach

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8/ *See In the Matter of Amendment of the Commission's Rules to Establish New Personal Communications Services*, Memorandum Opinion and Order, 9 FCC Rcd 4957 (1994) at ¶ 76 (PCS will be licensed on an MTA/BTA basis based on, in part, the recognition that the cellular MSA/RSA boundaries are too small for the efficient provision of regional or nationwide service.).

9/ *See* 47 U.S.C. §332(c)(3).

10/ Undoubtedly, some will argue that it is time that the CMRS industry "take its rightful place" in the telecommunications landscape. Comcast has no objection to this urging. The problem is that the invitation or desire for more active CMRS "participation" now serves the basis for grafting traditional constraints on a non-traditional industry. CMRS providers can be active contributors to the nation's telecommunications development without being made to "look

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which, at best, has resulted in extreme inequities which the Commission has shown itself ill-equipped to address in a timely fashion.

B. Uniform Policies for Competitive and Non-Competitive Markets do not Accomplish Commission Goals.

As ILECs and CMRS providers are fundamentally different and operate in markets with fundamentally different characteristics, it makes no sense, and is actually harmful, to force them to operate under the same regulatory scheme. Rather than serving the public interest, "one-size-fits-all" rules most directly advance the interests of those companies that are not currently competitive in one of two ways: either uniform regulation handicaps competitive segments of the market by imposing unnecessary cost or other burdens, or incumbents use the obvious unsuitability of heavy regulation on competitive markets as a club to achieve premature release from regulation necessary to their specific circumstances.[11/] In markets where dominant incumbents and newer, competitive providers both operate, uniform regulation creates an advantage for the incumbent and an unnecessary drag on the competitive market segment.

Uniform regulation that imposes compliance costs out of proportion to the potential public benefit will hurt the chances of the Commission seeing much actual competition from CMRS providers to the ILECs. CMRS providers may compete directly with ILECs in the future, but do not significantly do so now. They should not, therefore, be prematurely subjected to the

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10/ (...continued)
like" those whose histories and businesses are different. The Commission should promote diversity, not try to confine it.

11/ *See In the Matter of Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information, Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as Amended*, Reply to Oppositions to Petitions for Reconsideration of Comcast Cellular Communications, Inc., CC Docket No. 96-115, CC Docket No. 96-149 (filed July 6, 1998) at 4 (discussing ILEC attempts to eliminate their CPNI requirements by tying them to CMRS requests).

same type of regulation that Congress so recently determined was suitable for incumbent LECs or even landline carriers competing in the same market as incumbent LECs. The Commission's best course in dealing with competitive markets is to open opportunity and let the market determine the direction and speed of change. Until CMRS provides real substitute services, it certainly makes no sense to impose the same rules on CMRS providers that are imposed on landline ILECs.[12/] Even if wireless were to develop to a facilities-based substitute to the local loop, it may well be in a way not yet imaginable, making it simply short-sighted to restrict the range of possibilities by viewing wireless through the single prism of landline regulation.

C. Regulatory Symmetry Is Not Required by Law.

Nothing in the Communications Act or the revisions contained in the 1996 Act mandates regulatory symmetry in the form of identical rules applied to all industries.[13/] In fact, the 1996 Act, if anything, is structured to provide regulatory *parity* among similar types of operators rather than regulatory *symmetry*.[14/] And the recent pattern of Commission decisions that force

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12/ Congress came to this conclusion when it enacted the 1993 Budget Act. In the 1993 Budget Act, Congress forbade the states from rate regulating CMRS providers like landline LECs until CMRS becomes an actual, ubiquitous substitute for landline service. *See* 47 U.S.C. § 332(c)(3).

13/ In places the Communications Act and the 1996 Act refer to non-discrimination and equitable practices and create obligations that apply variously to all LECs or all telecommunications carriers. *See, e.g.*, 47 U.S.C. §251(b) (describing interconnection-related obligations required of all local exchange carriers) and 47 U.S.C. §254(b)(4) (requiring all telecommunications service providers to make an equitable and nondiscriminatory contribution to the preservation and advancement of universal service). These statutory provisions do not, however, require regulatory symmetrical rules or mandate regulatory parity as those terms appear to be applied by this Commission.

14/ Comcast has no objection to equivalent obligations where mandated by statutue and would agree, for example, that all telecommunications carriers could be required to contribute to a federal Universal Service fund under a policy of regulatory parity. Comcast objects, however, to the imposition of identical obligations that are ill-suited to all telecommunications carriers, such as the requirement that all Universal Service fund contributions be calculated in the same

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fundamentally different classes of carriers into the same set of regulations stands in contrast to the Commission's past practices.

In the intercarrier interconnection and number portability provisions of the 1996 Act, Congress consciously created varying regulatory obligations for ILECs, LECs and other telecommunications carriers.[15/] The notion that ILECs must make unbundled network elements available to interconnecting competitors, while CLECs and CMRS operators do not, makes perfect sense due to the differing situations of each of these types operators. As these provisions show, Congress recognized that regulatory uniformity makes sense where services being provided are "like" services and carriers are in "like" market positions, but saw it as unwise to impose symmetrical obligations on asymmetrical groups.

Congress also recognized this in the 1993 Budget Act, which created the new "Commercial Mobile Radio" category out of formerly differing service categories such as cellular, common carrier paging and land mobile, and specialized private radio (Congress did not tamper with this structure in enacting the 1996 Act). In establishing that service category, Congress directed the Commission to revise its rules and regulations to achieve regulatory parity

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14/ (...continued)
way, under a policy of regulatory symmetry.

15/ Section 251, for example, differentiates among ILECs, LECs and telecommunications carriers by singling out incumbent LECs for the most pervasive interconnection obligations. While the Commission now endorses regulatory symmetry, it certainly did not adopt such an approach in its Local Competition Order. In that Order, the Commission correctly found the interconnection rates charged by ILECs to be unreasonable and not in the public interest, and abrogated contractual provisions containing such rates. Under the Commission's interconnection framework only CMRS providers were ordered to continue paying these unlawful rates pending approval of renegotiated contracts by state commissions. *See In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Interconnection Between Local Exchange Carriers and Commercial Mobile Radio Services Providers,* Joint Petition for Reconsideration and Clarification of Comcast Cellular Communications, Inc. and Vanguard Cellular Systems, Inc., CC Docket No. 96-98, CC Docket No. 95-185 (filed September 30, 1996).

where carriers were, in fact, providing similar services in much the same way. The Commission was highly successful in this. It is important to note, however, that Congress did not require that the Commission force regulatory similarity where none existed due to differences in licensing, market structure and other areas.

D. The Commission Has Tailored Its Rules In the Past to Deal with Differing Carrier Circumstances.

In the past the Commission has recognized its obligation to tailor its rules based upon relevant market, technical, legal and historical differences. For example, in the interexchange industry, the Commission has for over fifteen years imposed differing requirements on dominant and nondominant carriers.[16/] Similarly, the Commission imposes different rules on ILECs based on their size or revenues,[17/] and has adapted its rules to account for the differences between rural and nonrural exchange carriers.[18/] While attempting to ensure similar regulatory landscapes when it adopted these rules, the Commission did not forego an analysis and thorough understandings of the marketplaces for the sake of achieving symmetry.

In contrast to these earlier rulemakings, the Commission's implementation of the 1996 Act has consistently failed to account for the strikingly different position of CMRS providers as

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16/ *See Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor*, Fourth Report and Order, 95 FCC 2d 554 (1983). In fact, when the circumstances changed in the interexchange market (AT&T was no longer dominant) the Commission reviewed the market changes and declared AT&T non-dominant. *See Motion of AT&T Corp. to be Reclassified as a Non-Dominant Carrier*, Order, 11 FCC Rcd. 3271 (1995).

17/ For example, only carriers with annual operating revenues in excess of the indexed revenue threshold are required to file annual reports under 47 C.F.R. § 43.21.

18/ For example, the Commission established different timetables to consider universal service reform for rural and non-rural areas.

compared with other telecommunications carriers.[19/] Instead of adopting rules tailored to the circumstances of different industry segments, as it has done in the past, the Commission has apparently concluded that because ILECs and CMRS providers are both telecommunications carriers, the same obligations should apply to both.

A policy of regulatory symmetry should not be viewed as an end in itself. Indeed, symmetry is only appropriate if services are determined, after investigation, to be similarly situated and directly competitive. For carriers as fundamentally different as CMRS providers and ILECs, symmetry should be the exception rather than the rule. To the extent the Commission insists in applying uniform rules to fundamentally different industries, these policies certainly will create inequities and frustrate opportunities for future development of competition to this nation's telecommunications monopolies.

III. FAILURE TO CONSIDER FUNDAMENTAL DIFFERENCES AMONG CARRIERS HAS RESULTED IN FLAWED REGULATIONS.

The Commission's general policy in favor of regulatory symmetry without regard to its impact on different segments of the telecommunications market has created substantial problems for CMRS providers as they struggle to adapt to uniform, LEC-oriented rules and procedures. Two recent rulemakings implementing provisions of the 1996 Act are apt examples of why, going forward, the Commission must make industry-segment specific determinations a centerpiece of its analysis prior to imposing rules on the entire telecommunications industry.

19/ There is one case where the Commission, in implementing the 1996 Act, did properly differentiate between competitive and noncompetitive carriers — in its implementation of the cross-subsidy provision of Section 254(k). *See Implementation of Section 254(k) of the Communications Act of 1934, as Amended*, Order, 12 FCC Rcd 6415, 6421 (1997).

A. Uniform CPNI Requirements Ignore How CMRS Providers Offer Their Services.

The Commission's recently adopted rules on customer proprietary network information ("CPNI") are manifestly ill-suited to CMRS providers. Section 222 of the 1996 Act establishes a new statutory framework that codifies the essence of the CPNI rules the Commission previously had had in place to protect consumers and competition against abuses from monopoly incumbent LECs. While Section 222 is a law of general application, the Commission declined to tailor its rules to the way different industry segments operate.[20/] Instead, the Commission applied the same CPNI requirements across all industry segments by adopting a "total service" approach to define the scope of implied permissive use of CPNI.[21/]

Due to the unique business environment that CMRS providers have always operated in, they quite naturally have developed business practices that are unlike those of incumbent LECs. For example, CMRS providers almost universally offer customers integrated service packages including customer premises equipment ("CPE"), usually handsets or other accessories. In contrast, the Commission took strong regulatory action in the 1960s and 1970s to remove unreasonable restrictions on customer use of CPE provided as a regulated monopoly service by the Bell System. The Commission ultimately determined that consumers were best served by detariffing of landline CPE, allowing consumers to purchase CPE from any number of sources

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20/ *See Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information*, Second Report and Order and Further Notice of Proposed Rulemaking, CC Docket No. 96-115 (released February 26, 1998) ("*CPNI Order*").

21/ This "total service" approach allows carriers to access CPNI of only those services that are regulated telecommunications services. This scheme allows, for example, a CMRS provider to use CPNI to identify an analog customer whose usage would suggest he is a candidate for digital service, but would not allow the same CPNI to be used to identify a customer that might benefit from being upgraded to a digital phone, as cellular phones are unregulated CPE.

like any other consumer good. To protect consumers from continuing Bell System misbehavior, the Commission placed strict rules on BOCs to prevent the bundling of CPE with regulated telephone service. In the CMRS market, in contrast, the Commission has recognized not only that bundling is a common practice, but that it has significant consumer benefits.[22/]

CMRS carriers also have developed customer incentive and retention programs to reduce costly customer churn. CMRS customer satisfaction programs typically use CPNI to identify customers and may involve an offer of deeply discounted or free CPE (*e.g.*, offering analog cellular customers digital handsets if they convert to digital CMRS service). CMRS providers also have, like any business in a competitive industry, used the information they have about their customers' network usage to attempt to market additional services, both regulated and unregulated, and to win customers back if they switch to another CMRS provider. By contrast, incumbent LECs have not been, and for the foreseeable future will not be, concerned with customer churn. This misuse of CPNI by ILECs threatens competition. No such threat exists for CMRS carriers who already operate in competitive markets.

While CMRS marketing practices of bundling CPE and service and of customer win-back plans clearly benefit the public, these benefits are jeopardized by imposing rules suited for incumbent monopoly LECs on the competitive CMRS industry. The Commission did not address the unique attributes of the CMRS marketplace when it adopted its CPNI rules (for

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22/ *See, e.g., Bundling of Cellular Customer Premises Equipment and Cellular Service,* Report and Order, 7 FCC Rcd 4028 (1992) (finding the bundling of cellular and CPE service to be in the public interest); *Amendment of the Commission's Rules to Establish New Personal Communications Services*, Memorandum Opinion and Order, 9 FCC Rcd 4957 (1994) (noting the benefits to consumers and spectrum efficiency of digital technologies); *Interconnection and Resale Obligations Pertaining to Commercial Mobile Radio Services,* Second Report and Order and Third Notice of Proposed Rulemaking, 11 FCC Rcd 9462 (1996) (encouraging seamless mobile service through mandatory roaming); *Craig O. McCaw*, Memorandum Opinion and Order on Reconsideration, 10 FCC Rcd 11786, 11795-96 (1995) (discussing benefits of "one-stop shopping" for combined offerings to cellular customers).

example, issues like customer churn). Instead, the Commission determined that because Section 222 used the term "telecommunications carrier" to describe the range of carriers subject to legal requirements to safeguard customer CPNI, it lacked discretion to vary the level of CPNI regulation based on differences in carriers' markets.[23/] Indeed, in that order the Commission even acknowledged that the rules would have a disproportionately adverse impact on the CMRS industry, but claimed its hands were tied. The Commission concluded that because Section 222 is framed as a general obligation, Congress must have meant that uniform regulations should be imposed irrespective of the harm caused or whether those rules made any practical sense in the applicable marketplace. A wide variety of carriers have raised concerns with the application of CPNI rules in this fashion. The only carriers not objecting were the ones who would derive the most benefit from "one-size-fits-all," the ILECs. Even the ILECs with CMRS affiliates argued against the application of the rules to CMRS, but as expected, used the occasion primarily to seek release from their restrictions as well.

Comcast and many others pointed out that the Commission was not obligated under Section 222 to impose uniform CPNI requirements, requirements that plainly had not been analyzed as to their impact on the way CMRS service is provided. The CMRS industry requested that the effective date of the CPNI rules as to CMRS providers be deferred pending reconsideration.[24/] Despite the obvious harms the rules impose on both consumers and CMRS

23/ *CPNI Order* at ¶ 49. There was (and is) no statutory support for such a claim. Comcast submits that the only thing tying the Commission's hands to a "one-size-fits-all" approach (even where the Commission is aware a uniform approach poses practical problems) is the Commission itself.

24/ *See* Request for Deferral and Clarification of Cellular Telecommunications Industry Association filed April 24, 1998, and Petition for Temporary Forbearance or, in the Alternative, Motion for Stay of GTE Service Corporation filed April 29, 1998, *Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information,*

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providers, and despite the nearly total record support showing how CMRS providers market CPE and information services differently from other providers, the Commission thus far has failed to offer the CMRS industry relief from these problematic uniform rules.[25/] Therefore, CMRS carriers are currently struggling to comply with rules that suggest they must drastically realign how they serve their customers, thereby harming competition and CMRS consumers.

B. Universal Service Requirements Are Ill-Suited For CMRS Providers.

In implementing Section 254 of the 1996 Act, the Commission specified that all telecommunications providers will contribute to the federal Universal Service fund based upon their end user revenues. Comcast does not take issue with its obligation to contribute to federal Universal Service programs, but has persistently urged the Commission to adapt its rules so that all CMRS providers can contribute to the Universal Service fund in a fair and consistent

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24/ (...continued)
CC Docket 96-115.

25/ The Common Carrier Bureau's clarification order did not alleviate CMRS provider concerns. *See, e.g., In the Matter of Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information, Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as Amended,* Petition for Reconsideration of Comcast Cellular Communications, Inc., CC Docket No. 96-115, CC Docket No. 96-149 (filed May 26, 1998) at 16 (discussing the Commission's *Clarification Order, In the Matter of Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information*, Order, CC Docket No. 96-115 (released May 21, 1998) ("*Clarification Order*").

manner.[26/] This is not possible under the Commission's current Universal Service fund rules, processes and mechanisms.

For example, almost a year after the CMRS industry alerted the Commission to this issue, major questions remain regarding how CMRS providers should complete the Universal Service fund form. The form is designed to allow easy importation of incumbent LEC uniform system of accounts ("USOA") data, but CMRS providers do not keep their accounting records in USOA formats. CMRS is also not subject to jurisdictional separations, and cannot easily classify revenues (such as a monthly access fee) as either interstate or intrastate, even assuming this is necessary or possible. CMRS licensees also typically do not maintain separate accounting books for each licensee at the level of detail required to determine "end-user telecommunications revenues," and therefore reporting simply cannot be made on the basis the form specifies.

CMRS providers have been requesting guidance from the Commission since August of last year to deal with these problems, as well as the problem of how to account for bundled service pricing.[27/] However, almost a year later, these issues still have not been addressed. Instead, the Commission has instructed CMRS providers to calculate their Universal Service

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26/ *See, e.g., In the Matter of Federal - State Joint Board on Universal Service, Proposed Third Quarter 1998 Universal Service Contribution Factors Announced,* Comments of Comcast Cellular Communications, Inc. and Comcast Corporation, CC Docket No. 96-45, DA 98-856 (filed May 22, 1998). In addition to the issue of fair contributions, Comcast has also raised other issues relating to Universal Service, such as the difficulties competitive carriers face in adapting to the Commission's ever changing Universal Service contribution factors. *See In the Matter of Changes to the Board of Directors of the National Exchange Carrier Association, Inc., Federal-State Joint Board on Universal Service,* Petition for Reconsideration of Comcast Cellular Communications, Inc. and Vanguard Cellular Systems, Inc., CC Docket No. 97-21, CC Docket 96-45 (filed September 2, 1997).

27/ *See* Letter from Randall S. Coleman, Vice President for Regulatory Policy and Law of CTIA, to Jeanine Poltronieri, Associate Chief, Wireless Telecommunications Bureau, Federal Communications Commission, dated August 21, 1997, regarding Wireless Issues Raised by the Universal Service Worksheet, *Federal-State Joint Board on Universal Service* (CC Docket No. 96-45).

fund obligations using "good faith estimates" on an interim basis,[28/] and in certain instances informally have suggested to certain CMRS carriers a specific percentage of interstate/intrastate revenues to complete their forms. As Comcast has observed, reliance upon totally different approaches, even in good faith, creates inequities in payment that will prove extremely difficult to iron out.[29/] And there is no excuse for Commission staff suggesting percentages to Comcast's competitors, while at the same time failing to provide the formal guidance the CMRS industry so directly sought.

Since last August, wireless carriers who are direct competitors of Comcast have been using different methodologies in completing the Universal Service Worksheet. And, as expected, competitive inequities have emerged. Not only is Comcast effectively subsidizing its competitors' calculations (because the Commission's "good faith estimate" permits widely varying practices in any single geographic market), but Comcast and its competitors independently are arriving at significantly different customer Universal Service fund cost recovery assessments because of the continuing lack of Commission guidance and non-uniform reporting practices. Moreover, the Commission has yet to publicly confirm its intention to "true-up" past contributions once competitively neutral reporting and contribution mechanisms are established. The continued lack of guidance on how to adapt for CMRS a form that plainly was inspired by ILEC accounting and the way ILECs do business has resulted in fundamental

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28/ *Id. See also Changes to the Board of Directors of the National Exchange Carrier Association, Inc.; Federal - State Joint Board on Universal Service*, Order on Reconsideration, Second Report and Order and Further Notice of Proposed Rulemaking, CC Docket No. 97-21, CC Docket No. 96-45 (released August 15, 1997).

29/ *See In the Matter of Changes to the Board of Directors of the National Exchange Carrier Association, Inc., Federal-State Joint Board on Universal Service,* Petition for Reconsideration of Comcast Cellular Communications, Inc. and Vanguard Cellular Systems, Inc., CC Docket No. 97-21, CC Docket 96-45 (filed September 2, 1997) at 10.

unfairness: some carriers pay too much and some carriers pay too little into the Universal Service fund. This situation has festered far too long. The Commission must, as it recently assured the Court in the Fifth Circuit, move immediately to address these problems.[30/]

Most important, this could have been avoided if the Commission considered the circumstances of all carriers before regulating, and recognized that it is not a violation of the Act to adapt its requirements to the factual circumstances and market conditions of the industries affected. The Commission's inability to address this issue promptly also demonstrates how ineffective the "rule-forbearance" model which is being proposed will be. Rather than addressing the CMRS-specific issues head on, Commission staff no doubt have been trying to figure out how to carve an exception without tampering with the fundamental structure of the original rule. Time ticks away, and millions of dollars are being inequitably overpaid into the Universal Service program by some while others are avoiding their fair share of burden. This type of "after the fact" exception making will always be time consuming, will never fully account for differences, and will always be constrained in the level of adaptation permitted.[31/]

Two other examples highlight this critical point. The Commission's implementation of Section 254(g)'s interexchange services rate averaging, without any record whatsoever of whether and how CMRS operators provided or packaged interstate interexchange service, extended the interexchange carrier rate averaging obligation onto CMRS operators.[32/] Only after

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30/ "Most recently, the Commission reiterated that '[t]hese are difficult issues, and we are committed to working with the wireless industry . . . to resolve' them." Brief for Federal Communications Commission at p. 146, *Texas Office of Public Utility Counsel, et al. v. Federal Communications Commission and the United States of America*, in the U.S. Court of Appeals for the Fifth Circuit, No. 97-60421 (and consolidated cases).

31/ The Commission's CPNI *Clarification Order* is another prime example.

32/ *See Policy and Rules Concerning the Interstate, Interexchange Marketplace;*

(continued...)

the Commission was barraged with concern that this approach was entirely unworkable did the Commission hold its application of this symmetrical policy in abeyance as to CMRS pending reconsideration.[33/] But why force carriers and the Commission to go through that? Would not prior review, or initial recognition that the markets and technologies differed, have been a much more productive way to deal with that issue?

Another example of having to unscramble the eggs is local telephone number portability. The 1996 Act is plain that the legal obligation to provide portability extends only to local exchange carriers, and CMRS is not a LEC either under the definition of the 1996 Act or under any finding of the Commission. Yet, in another version of regulatory symmetry, the Commission found it desirable to require CMRS providers in the top 100 MSAs to provide local number portability.[34/] While the Commission apparently believed by its action it had limited the obligation to the largest metropolitan markets, it overlooked the mobile nature of CMRS. To support roaming local number portability must be made available by *all* CMRS carriers, both large and small, nationwide.[35/] Moreover, since adoption of the rule, virtually all CMRS carriers — even some of our strongest earlier proponents — have urged the Commission to forbear due

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32/ (...continued)
Implementation of Section 254(g) of the Communications Act of 1934, as amended, First Memorandum Opinion and Order on Reconsideration, 12 FCC Rcd 11812 (1997).

33/ *See Policy and Rules Concerning the Interstate, Interexchange Marketplace; Implementation of Section 254(g) of the Communications Act of 1934, as amended,* Order, 12 FCC Rcd 15739 (1997).

34/ *See Telephone Number Portability,* First Report and Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd. 8352 (1996) at ¶ 4.

35/ CTIA's petition for forbearance from number portability requirements for CMRS providers is still pending even while the implementation dates loom. *See Wireless Telecommunications Bureau Seeks Comment on CTIA Petition Requesting Forbearance from CMRS Number Portability Requirements,* Public Notice, DA 98-111 (released January 22, 1998).